No. 85-1599

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

CITY OF SAN DIEGO, et al.,

Petitioners,

v.

SPORTS ARENAS PROPERTIES, et al.,

Respondents.

On Writ of Certiorari to the
Supreme Court of California

PETITION FOR CERTIORARI

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March 31, 1986

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QUESTIONS PRESENTED

1. Did HUD acquisition of a HUD insured project upon default of the owners/developers extinguish the terms and conditions of a municipal conditional use permit which require the project to be operated on a nonprofit basis for senior citizens only, thus preventing Petitioner from enforcing said conditions?

2. Does the operation of an apartment complex as a low- and moderate-income multi-family project under 12 U.S.C. 1715l, even though originally developed under a conditional use permit which requires its operation as a nonprofit project for senior citizens, contravene congressional intent?

3. Do HUD regulations preempt local zoning controls in spite of clear statutory language indicating congressional intent that HUD insured projects are to comply with local land use law?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners include those parties to the proceedings below as follows:

> The City of San Diego, Mayor and City Council of The City of San Diego, Charles Abdelnour, Clerk of the City of San Diego, University City Village Tenants Association, and Gertrude Evans.

Respondents include those parties to the proceedings below as follows:

> Sports Arenas Properties, Inc., Kopler Enterprises, Inc., and Chase Hotels, Inc.

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The petitioner, City of San Diego, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California.

OPINION BELOW

The opinion of the California Supreme Court, reported at 40 Cal.3d 808 appears in Appendix A hereto.

JURISDICTION

The judgment of the California Supreme Court was entered on December 31, 1985. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

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STATEMENT OF THE CASE

In March, 1962, the Foundation for Specialized Group Housing applied to Petitioner City of San Diego "to construct and operate a nonprofit senior citizen housing project under the requirements specified in the Federal Housing Act, Title II, Section 231." The application stated that the project would be operated by a "qualified nonprofit organization" and occupancy would be restricted "to senior citizens who qualify." The City's Planning Commission recommended denial of the application on the basis that the planned 549 apartment units in 78 buildings created an unacceptable density. The City, however, overruled the Planning Commission's decision and issued the conditional use permit (CUP).

The preamble to the CUP set forth the wording from the application indicating it was issued pursuant to the request of the Foundation for Specialized Group Housing to construct and operate a nonprofit senior citizens housing project. The first condition referred to the "proposed senior citizens housing project" but none of the other seven conditions mentioned or defined the terms "senior citizens" or "nonprofit." There are no provisions in the permit expressly limiting operation or occupancy or expressly prohibiting sale or transfer of the property. Appendix B.

After the submission and approval of a revised plot plan, the property was acquired by a profit corporation and constructed with private financing insured under Section 221 of Title II of the National Housing Act, 12 U.S.C.A. Section 1715l (1980) as low- and moderate-income multi-family housing. Appendix C. Tenants initially were limited to those 50 years of age or older and have always comprised a large part of the tenant population, even though the project was not insured under and regulated as a Title II, National Housing Act, Section 231, 12 U.S.C.A. Section 12715v (1980). Appendix C.

In 1966, the Department of Housing and Urban Development (HUD) acquired the project from the lender in accordance with its insurance agreement and operated the project for nearly three years renting to persons 21 years of age or older. In 1968, HUD sold the property to an affiliate of one of the respondents and the predecessor of another, all for-profit corporations. Until the property was refinanced and the HUD note paid off, the owners operated University City Village as multi-family low- and moderate-income housing.

In 1979, respondents filed and the City denied an application for a tentative subdivision map to convert to condominium units. Respondents sought to compel the City to permit conversion by a writ of mandate and also sought declaratory relief. Petitioner City answered and filed a cross-complaint seeking an injunction to require respondents to operate the project on a nonprofit basis and to rent only to senior citizens. Petitioners Gertrude Evans, a tenant, and the University Village Tenants Association intervened in support of Petitioner City. The trial court denied the petition for writ of mandate and enjoined respondents from operating the apartments on other than a nonprofit basis and from renting any apartment unless one tenant is at least 55 years old. Nonprofit basis was defined as meaning that "gross operating income does not exceed reasonable operating expenses."

Respondents appealed to the Fourth District Court of Appeal which reversed the lower court, holding that the CUP is vague and ambiguous and that because the CUP was not recorded and respondents denied actual knowledge of the terms of the CUP, it was unenforceable as against them as successors-in-interest. Petitioners petitioned the California Supreme Court for hearing, briefing all issues heretofore raised including the challenge to the San Diego Condominium Conversion Ordinances (which was abandoned by Respondents prior to hearing), the enforceability of the conditional use permit to successors-in-interest, and the interpretation of the terms and the validity of the restrictions. The issue of

the HUD acquisition and resulting extinguishment of the condition that the project be operated on a nonprofit basis and rented only to senior citizens was not briefed.

The California Supreme Court in its opinion filed December 31, 1985, held that all the terms and conditions of the CUP would be valid and enforceable against the present owners had not HUD repossessed the project upon default of the developer thereby extinguishing the existing terms and conditions. It held that upon acquisition of the project, HUD had the discretion to determine to whom it would sell and the restrictions to be placed on the new purchaser, thereby imposing or reimposing a new set of restrictions. Appendix A-10.

REASONS FOR GRANTING THE WRIT

1. The decision below raises important and reoccurring issues concerning the effect of federal statutes on state and local efforts to provide affordable housing for all citizens through local zoning controls.

Throughout San Diego and other cities across the United States, local governments attempt to provide for the housing needs of all segments of society, including the elderly, the poor, those of middle income, and other groups who have special needs. This is in part accomplished through zoning devices such as conditional use permits, variances, and planned residential developments. Such permits allow uses not otherwise authorized by the applicable zoning ordinance and, at the same time, limits and conditions the use in certain ways. Appendix A-5. The developments which are authorized by the special permits are often directly financed by the federal government or developed with private funds insured by an arm of the federal government.

In the case of housing for the elderly, projects can be built and financed by private parties, with the financing insured by HUD pursuant to 12 U.S.C. 1715v. HUD in turn imposes regulations pertaining to its construction, operation, occupancy, rent and other financial matters. One of the applicable regulations the City relies upon in its planning specifies that the project "shall not violate any material zoning or deed restrictions applicable to the project site, and shall comply with all applicable building and other government regulations." 24 C.F.R. Section 231.10(b) (1980). The statute pertaining to housing for low- and moderate-income families is even more specific; 12 U.S.C. 1715l(d)(2) mandates that dwellings on secured property meet "the requirements of all state laws, or local ordinances or regulations, relating to the public health or safety, zoning, or otherwise, which may be applicable thereto . . ." 24 C.F.R. Section 221.545(c) also requires compliance of such projects with local zoning, deed restrictions and building and other government requirements.

Petitioner City issues conditional use permits with the expectation that, as HUD insured developments, compliance with local land use regulations is assured. In the instant case, the CUP was granted with the expectation that the project would always be occupied primarily by senior citizens. In fact, the CUP was issued in spite of objections by the Planning Commission regarding the project's density because the developers claimed that it would house fewer people as a senior citizens project than a similar project not so limited. Appendix A-3. Local school and park construction and planning reflect the elderly population. Further, a condition of the CUP authorized fewer parking spaces for the residents of University City Village because the project was primarily for elderly citizens who own and drive fewer cars.

HUD, in turn, had no reason to know that the developers were violating the terms of the CUP simply be applying for insurance for a low- and moderate-income multi-family project. HUD had no reason to know that development of University City Village as a Section 221 project was in contradiction to local zoning regulations, and consequently its own regulations. Further, HUD did

not intend to preempt local zoning restrictions, including those terms and conditions in the CUP, either in the development, operation upon acquisition or regulation as a Section 221 project after disposition. Indeed, HUD apparently believed that it was perpetuating the lawful and proper use as a low- and moderate-income multi-family project.

However, the lower court held that HUD can preempt local zoning regulations in its discretion and that terms and conditions integral to the CUP and the City's housing plans can be nullified or changed upon acquisition by HUD or the subsequent sale by HUD to a private purchaser. The lower court's finding of federal preemption of local zoning, in spite of clearly articulated congressional intent to the contrary, and in spite of facts indicating that HUD did not intend that its regulations preempt local zoning regulations, is error. If allowed to stand, cities throughout California will be wary of projects financed or insured by HUD and their plans to provide for the housing needs of all their citizens will be jeopardized.

2. The lower court's ruling is contrary to long standing federal preemption law as articulated by this court.

In a recent decision of this court, *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. __, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), the Supremacy Clause, U.S. Constitution Article VI, Clause 2, is explored and analyzed. This court stated that pursuant to the Supremacy Clause, federal law supersedes state law when congress is empowered to preempt state law by so stating in express terms, where congress intends to preempt state law in a particular area although not articulated, or where state or local law conflicts with federal law. "The question whether the regulation of an entire field has been reserved by the federal government is, essentially, a question of ascertaining the intent underlying the federal scheme." *Id.* 471 U.S. at __, 85

L.Ed.2d at 721 and 105 S.Ct. at 2375. In the instant case, one does not need to go beyond the express terms of the applicable statute and HUD regulations. It is abundantly clear that no conflict exists between local and federal law and that congress did not intend that local zoning and land use regulations be preempted by looking to the relevant sections in the National Housing Act requiring compliance with local zoning, building laws and other local regulations.

In the case cited above, *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, the municipal ordinance at issue regulated the collection of blood plasma from paid donors supplementing federal regulations promulgated by the Food and Drug Administration establishing standards for such collection. The holding of the case lends support to an analogous lower court decision involving federal preemption of municipal land use regulations. In *Stewart v. U.S. Postal Service*, 508 F.Supp. 112 (D.C. Cal. 1980), the court held that the Post Office need not comply with city zoning where federal law is in conflict. However, the court stated that, had the Post Office articulated its intent by statute to comply with local laws, the Post Office would be required to comply with municipal land use regulations. In the instant case, there is express language requiring the relevant HUD projects to be in compliance with local zoning, building and other land use regulations; the CUP should, therefore, be enforceable by Petitioner City.

CONCLUSION

The California Supreme Court's decision precluding Petitioner City from enforcing all the terms and conditions of Conditional Use Permit No. 4826 is contrary to HUD's own regulations, congressional intent and well established preemption law. Because allowing the decision to stand would create disarray in local governments' efforts to provide housing for all citizens in a well planned manner, this Court should take the opportunity to

reaffirm established preemption law as it applies to situations involving local land use law.

DATED: March 31, 1986

Respectfully submitted,

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Counsel for Petitioners

APPENDICES

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L.A. No. 31987

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SPORTS ARENAS PROPERTIES

v.

CITY OF SAN DIEGO

SUPREME COURT
FILED
DEC 31 1985
Laurence P. Gill, Clerk
DEPUTY

Submitted

Bird
Chief Justice

SUPREME COURT
FILED
DEC 31 1985
LAURENCE P. GILL, Clerk
Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SPORTS ARENAS PROPERTIES, INC., et al.,

Plaintiffs, Cross-defendants and Appellants,

v.

CITY OF SAN DIEGO, et al.,

Defendants, Cross-complainants and Respondents.

UNIVERSITY CITY VILLAGE TENANTS ASSOCIATION et al.,

Interveners and Respondents.

L.A. 31987

(Super. Ct. Nos. 448425 and 456802)

Plaintiffs appeal from a judgment enjoining them from renting their apartments except to senior citizens on a non-profit basis.[1] We conclude that the injunction must be vacated because the trial court misinterpreted the conditional use permit pursuant to which the project was to be built.

[1] The judgment also denied a petition for writ of mandate seeking to compel defendant city to approve conversion of the apartments to condominiums. Although plaintiffs appealed, they have abandoned their appeal from this part of the judgment.

SEE CONCURRING AND DISSENTING OPINION

In March 1962, the Foundation for Specialized Group Housing applied to the City of San Diego "to construct and operate a non-profit senior citizen project under the requirements specified in the Federal Housing Act, Title II, Section 231. The project will consist of 549 apartment units in 78 buildings providing beautiful and adequate community facilities. The project will be operated by a qualified non-profit organization, The Foundation for Specialized Group Housing. Occupancy is restricted to senior citizens who qualify."

The city owned the property at the time of the application but a month later the city conveyed the property to University City, Inc., a corporation organized for profit.

Although its planning commission recommended denial of the application,[2] the city issued the conditional use permit in June as follows:

"That Conditional Use Permit, Case No. 4826, requested by The Foundation for Specialized Group Housing to construct and operate a non-profit Senior Citizens Housing project located south of Governor Drive between Genesee Avenue and Boundary Freeway, in the R-1 zone, documented as No. 639744, May 31, 1962, in the office of the City Clerk, be, and the same is hereby approved subject to the following conditions:

"1. That prior to the issuance of any building permits, complete building plans of the proposed senior citizens housing project (including signs) shall be submitted to the Planning Director for approval. Said plans shall be in substantial conformity with Exhibit 'A' on file in the Office of the Planning Department. The property shall be developed in accordance with the approved building plans except where regulations and this and/or other governmental agencies require deviation therefrom."

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[2]The planning commission objected to the project's density; the developers claimed that because the project was for senior citizens, it would house fewer people than a similar project not so limited.

Seven additional conditions were appended to the permit relating to matters such as the filing of a subdivision map, landscaping and parking, but none of the other conditions mentioned "senior citizens" or "nonprofit." The conditional use permit was not recorded by the county recorder. There is no provision in the permit expressly prohibiting sale or transfer of the property.

The foundation did not acquire the property or construct or operate the project. University City, Inc., in 1963 submitted a revised plot plan reducing the number of units, deleting a medical facility, and adding a nine-hole golf course. The documents submitted did not include any references to "senior citizens" or "nonprofit." The revision was approved.

The property was transferred between several profit corporations apparently affiliated with University City, Inc., and was ultimately built with private financing insured under section 221 of title II of the National Housing Act (12 U.S.C.A. § 1715l) as low- and moderate-income housing rather than section 231 of the act (12 U.S.C.A. § 1715v). Tenants initially were limited to those 50 years of age or older.

The developers were able to rent only about one-third of the units, and they defaulted on the federally insured financing. The Department of Housing and Urban Development (HUD) acquired the project from the lender in accordance with its insurance agreement and operated the project for nearly three years renting to persons 21 years of age or older. In 1968, HUD sold the properties to an affiliate of one of the plaintiffs and the predecessor of the other. HUD received a down payment and a note secured by deed of trust for more than $6 million. After the HUD sale, the property was owned and operated by profit corporations under a letter agreement with HUD. Under the agreement, the total amount of rent to be charged was fixed to cover estimated expenses and debt service and to provide a profit to the owners. It does not appear that any means test was applied to tenants. Property taxes were paid on the property.

The property was refinanced, and the HUD note was paid off. In 1979 plaintiffs filed an application for a tentative subdivision map to convert to condominium units. The city denied the application.

Plaintiffs then commenced the instant proceeding to compel the city to permit conversion to condominiums. They also sought declaratory relief. The city answered and filed a cross-complaint seeking an injunction to require plaintiffs to operate the project on a nonprofit basis and to rent only to senior citizens. One of the tenants and the tenants' association intervened and supported the city's position.

The trial court denied the petition for writ of mandate and enjoined plaintiffs from operating the apartments on other than a nonprofit basis and from renting any apartment unless one tenant in it is at least 55 years old. Nonprofit basis was defined as meaning that "gross operating income does not exceed reasonable operating expenses."[3]

THE CONDITIONAL USE PERMIT

A. Existence of a Restriction

Plaintiffs first contend that the conditional use permit did not restrict the use of the property to nonprofit senior citizen rental housing because the express conditions of the permit did not include requirements that the property be used for senior citizens on a nonprofit basis. It is urged that only the conditions enumerated restrict the permit, that the terms nonprofit and senior citizen appear in the recitals of the permit, that there is no reference to nonprofit in the conditions and that the only reference to senior citizen

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[3] During the pendency of this proceeding, plaintiffs increased rents; we stayed further increases.

in the conditions is merely to describe the project and is not a limitation.

Ordinarily, a zoning ordinance permits certain uses for an area but provides that other uses may be permitted after consideration by a governmental agency as to whether the proposed other use will be in the best interests of public convenience and necessity and not contrary to the public welfare. (Upton v. Gray (1969) 269 Cal.App.2d 352, 357; Tustin Heights Assn. v. Bd. of Supervisors (1959) 170 Cal.App.2d 619, 626.) A conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations, but because of the possibility that the permitted use could be incompatible in some respects with the applicable zoning, a special permit is required. (County of Imperial v. McDougal (1977) 19 Cal.3d 505, 510.)

When a conditional use permit is obtained, the permittee may make those uses of the property authorized by the zoning ordinance in the absence of a permit and in addition those uses authorized by the permit. But the conditional use permit does not permit uses authorized neither by the permit nor by the zoning ordinance without permit. Thus, the use permitted is both a grant of authority to use and a limitation on the authorized uses of the property.

The conditions of the permit further limit the authority to use the property pursuant to the use permit, and if the permittee exercises its authority to use the property in accordance with the permit, it must accept the burdens with the benefits of the permit. (County of Imperial v. McDougal, *supra*, 19 Cal.3d 505, 510-511.) Absence of conditions in the use permit does not mean that the permittee may make uses of the property permitted neither by the use permit nor by the zoning ordinance without permit.

We reject plaintiffs' claim that the absence of express conditions limiting the use to nonprofit and senior citizens means that the property was not limited to those uses. The use of the property

after issuance of the permit was limited to those uses permitted by the zoning ordinance in the absence of permit and the one authorized by the permit, a "non-profit Senior Citizens Housing project."

B. Interpretation and Validity of the Restriction

Plaintiffs next urge, and the Court of Appeal concluded, that the terms of the conditional use permit are vague, uncertain and ambiguous and may not be enforced.[4] However, the permit must

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[4] In concluding that the conditional use permit was vague, uncertain and ambiguous, the Court of Appeal pointed out:

"The National Housing Act (tit. 12, U.S.C.A., ch. 13, §§ 1701-1750g) refers to public or nonprofit private agencies. The term "corporation" means any incorporated private institution or foundation [¶] (A) no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; [¶] (B) which has a governing board (i) the membership of which is selected in a manner to assure that there is significant representation of the views of the community in which such project is located, and (ii) which is responsible for the operation of the housing project assisted under this section; and [¶] (C) which is approved by the Secretary as to financial responsibility.' (§ 1701q(d)(2).)

"Nonprofit activities, nonprofit associations, nonprofit charitable organizations, nonprofit community organizations, nonprofit cooperative associations, nonprofit corporations, nonprofit organizations, nonprofit property owners' associations and other nonprofit agencies found in our codes suggest myriad forms of such activities and include specific definitions (see West's Ann. Cal. Codes, Gen. Index, MO to Q (1981 ed.)).

"The phrase 'senior citizen' did not have a legal or dictionary definition in 1962. The National Housing Act, *supra*, as of 1962, defined elderly persons as 62 years of age or older (§ 1701q(d)(4); § 1715l(f); § 1715v(a)(2)). The Slum Clearance, Urban Renewal and Farm Act defined elderly persons as 62 years of age or older (tit. 42, ch. 8A, § 1471). The Social Security Act defines an aged individual as 65 years or older (tit. 42, U.S.C.A., ch. 7, Social Security, § 1382c; § 1395c). . . .

"California legislation enacted since 1962 uses various phrases in reference to older persons. The California Interdepartmental Committee on Aging provides services and programs for 'older Californians' (Welf. & Inst. Code, §§ 9340-9353) and area agency aging advisory councils are concerned with 'older persons' (Welf. & Inst. Code, §§ 9360-9365). The Elder Abuse Reporting Act refers to an 'elder' as a person 65 years of age or older (Welf. & Inst. Code, §§ 9380-9386). In 1977,

(fn. continued)

be read in the light of the application for it, and when that is done, it is apparent that the terms of the permit are clear. The application shows that the nonprofit senior citizens housing project is described in the Federal Housing Act, title II, section 231. The permit states that the application is "approved." It is apparent that the city council by approving the application intended that the term "non-profit Senior Citizen Housing project" in the permit have the same meaning as that term is given in the application, a project "under the requirements specified" in section 231. That section establishes the definition of nonprofit senior citizen housing.

Section 231 added in 1959 (73 Stat. 665 [12 U.S.C.A. § 1715v]) established a program for insurance of mortgages on housing for the elderly by the federal government. The purpose of the section "is to assist in relieving the shortage of housing for elderly persons and to increase the supply of rental housing for elderly persons." The term "elderly person" is defined as any person who is 62 years of age or over. The word "housing" is defined as eight or more new or rehabilitated living units, not less than 50 percent of which are specially designed for the use and occupancy of elderly persons.

(fn. 4 continued)

the phrase 'senior citizen' first appears in the Multipurpose Senior Citizens Project legislation in defining a 'senior citizen' as a person 65 years of age or older (Welf. & Inst. Code, §§ 9400-9413) and in 1983 the Multipurpose Senior Services Program provided for persons aged 65 or older (Welf. & Inst. Code, §§ 9520-9527) and the Foster Grandparent Program refers to those participating as being 60 years or older (Welf. & Inst. Code, §§ 9400-9409). The Senior Companions Program defines adults 60 years of age or older as 'senior companions' (Welf. & Inst. Code, §§ 9540-9544). The California Community Crime Resistance Program defines an 'elderly or senior citizen' as an individual 55 years of age or older (Pen. Code, § 13841, subd. (b)). A claimant under the Senior Citizens Homeowners and Renters Property Tax Assistance Law is an individual 62 years of age or older (Rev. & Tax. Code, § 20505) who owns or rents a residence. The California Commission on Aging acts on behalf of 'older persons' (Welf. & Inst. Code, § 9201)."

The section provides that the mortgages insured may be equal to the lesser of certain maximum amounts per unit and replacement cost of the project if executed by a nonprofit corporation or public agency, and if not so executed, 90 percent of replacement cost, which may include an allowance for builder's or sponsor's profit and risk of 10 percent of costs other than land. A nonprofit corporation is organized for purposes other than profit of the organization or persons identified with it. (24 C.F.R. § 231.2(j).) The nonprofit corporation is one "regulated or supervised under Federal or State laws or by political subdivisions of States, or agencies thereof, or by the Secretary under a regulatory agreement or otherwise, as to rents, charges, and methods of operation." (12 U.S.C.A. § 1715v(c)(3).)

Under the section the mortgage must provide for a complete amortization. (12 U.S.C.A. § 1715v(c)(5).) The section incorporates provisions (12 U.S.C.A. § 1713) dealing with foreclosure for default, operation by HUD of properties acquired, and resale.[5] When property is acquired, the property may be sold for cash or credit or leased in the discretion of the Secretary of HUD for the protection of the insurance fund. (12 U.S.C.A. § 1713(l); 24 C.F.R. § 290 et seq.)

Although section 231 does not use the term "senior citizen" but instead the term "elderly person," the two terms must be treated as identical, otherwise the section, contrary to the express terms of the application, would not be applicable. It is also clear that "nonprofit" as used in the section means a nonprofit corporation

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[5] Section 221 of title II of the National Housing Act under which the project was originally financed contains roughly similar provisions for insurance of mortgages for housing for low- and moderate-income families and displaced families. (12 U.S.C.A. § 1715l.)

as mortgagor; the word is not used in the section to refer to operation on a nonprofit basis.[6]

We conclude the conditional use permit incorporated the provisions of section 231 and therefore the permit is not vague, uncertain or ambiguous in using the term nonprofit senior citizen housing. However, it does not follow that the injunctions may be sustained on the basis of the permit.

C. The Condition and the Injunction

The permit did not restrict the use of the property to nonprofit senior citizen housing in the event that HUD was required to take over the project under its guarantee. When HUD took over the property, it was not under a duty to sell the property to a nonprofit agency but could sell to profit-making organizations, and it was not under a duty to limit the use of the property to senior citizens or moderate- or low-income tenants.

The permit, as we have seen, incorporates the provisions of section 231. Thus it incorporates the part of the section expressly incorporating the provisions of 12 United States Code Annotated section 1713(l). (12 U.S.C.A. § 1715v(e); see also 12 U.S.C.A. § 1715l(g).) The term "non-profit Senior Citizens Housing Project" in the permit used to describe the project described in the application may not reasonably be interpreted to incorporate the provisions of section 231 and at the same time to exclude some of the provisions of the section. Under section 1713(l) HUD is authorized to sell property acquired for cash or credit in its

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[6] A nonprofit organization which successfully manages a section 231 project would ordinarily make substantial gains. As pointed out above, the mortgage must provide for complete amortization (12 U.S.C.A. § 1715v(c)(5)), and during the amortization period, a successful nonprofit organization would be building equity and at the end of the period it would be in the same position as any other owner which had paid off its mortgage. Increases in equity would permit a nonprofit organization dedicated to providing housing for the elderly to refinance and build additional projects, furthering the congressional purpose of increasing the supply of housing for the elderly.

discretion for the protection of the insurance fund. While local concerns and the purposes for which the project was built are factors to be considered in disposing of multifamily projects, the factors are to be considered along with HUD's objective of protecting the financial interests of the government and producing a satisfactory return to the mortgage insurance funds. (24 C.F.R. § 290.20.) Obviously, limitation of sale to a nonprofit agency could seriously impair HUD's ability to protect the insurance funds. Since the permit provision for nonprofit senior citizen housing contemplated sale to a profit-making organization by HUD upon such limitations as it found proper, the trial court could not properly impose additional limitations on the basis of the provision.

Because the conditional use permit authorized a section 231 project, HUD, once it acquired the property under its guarantee, had the power to determine to whom it would sell and the restrictions to be placed on the purchaser. It does not appear that plaintiffs are in violation of any HUD restrictions.

D. Failure to Comply With the Permit

The developer of the project did not proceed under section 231 and the project was not operated by the Foundation for Specialized Group Housing, a nonprofit corporation, as provided in the application for the permit. Thus the project was not built and operated in accordance with the permit. Section 231 financing and regulation applies only to new projects and certain new rehabilitation projects. It does not seem possible at the present time to comply with the permit without tearing the project down.

The question arises whether the failure to comply with the permit or other applicable zoning furnishes a ground to require the present owners of the project to operate on conditions other than those specified in the permit.

While there may be other cases where the failure to comply with a permit might justify regulations other than those provided for by

the permit, this is not such a case. First, the present owners are not the ones who failed to comply with the permit. Secondly, it does not appear that the failure to comply with the permit requirement of financing under section 231 and operation by a nonprofit corporation was of substantial importance in the light of subsequent events. The developer, a profit-making corporation, proceeded under section 221, and it defaulted. The provisions of section 221 and 231 are the same in most relevant respects except that section 221 is limited to moderate- and low-income housing while section 231 requires at least one-half of the units be designed for the elderly. Since the elderly can also rent section 221 housing, it does not appear how section 231 housing would have increased the number of tenants.[7] Similarly, it does not appear how a nonprofit operator could have been able to rent substantially more than one-third of the units and prevented default.[8]

The portion of the judgment enjoining plaintiffs from renting except to senior citizens on a nonprofit basis is reversed.

BROUSSARD, J.

WE CONCUR: MOSK, J.; REYNOSO, J.; GRODIN, J.; LUCAS, J.; *KAUS, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council

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[7] A 1978 survey showed that 72 percent of the units were occupied by persons 67 or older.

[8] There is no reason to assume that the initial rents at a project built under sections 221 and 231 will vary significantly if the project is owned by a nonprofit rather than a profit corporation.

So long as the builder is able to construct the project at or below the maximum allowed per unit, rents should not be substantially affected by the fact that the owner of the project is a profit-making organization rather than a nonprofit agency. The nonprofit owner may obtain a larger loan on the property, requiring larger principal and interest payments to amortize, and the difference should largely offset the profit on investment allowed the profit-making organization.

SPORTS ARENAS PROPERTIES, INC. v. CITY OF SAN DIEGO

L.A. 31987

CONCURRING AND DISSENTING OPINION BY BIRD, C.J.

I write separately to express my concern that the majority's result undermines the City of San Diego's legitimate efforts to provide affordable rental housing for the poor and elderly.

Although I agree with the majority's conclusion that the provisions of the conditional use permit are valid and binding upon successors-in-interest (see maj. opn., *ante*, at p. __ [typed opn. at p. 7]), I cannot agree that the violation of these terms does not justify the imposition of an injunction.

The majority posit that HUD's ability to protect its mortgage insurance funds would be seriously impaired if the limitations in the permit were deemed applicable to HUD and subsequent purchasers. That conclusion is somewhat surprising given the marked lack of evidence in the record to support it. The majority evade this problem by creatively holding that (1) HUD has the power to determine the restrictions to be placed on a property once HUD acquires it; (2) this power was implicitly authorized in the original permit; and (3) the conditions delineated in the permit are superfluous and, therefore, constitute "additional limitations" which equity deems unenforceable. (Maj. opn., *ante*, at pp. __-__ [typed opn. at pp. 12-13].)

Contrary to the majority's assertion, Title II of the National Housing Act (12 U.S.C.A. § 1713(l)) does *not* authorize HUD to ignore land use regulations propounded by the city in the name of ensuring a satisfactory return on insurance funds. (Maj. opn., *ante*, at p. __ [typed opn. at p. 12].) Moreover, even assuming that it did, there has not been an adequate showing that "HUD's

objective of protecting the financial interests" of the fund (maj. opn., *ante*, at p. __ [typed opn. at p. 12]) justifies the denial of safe and sanitary housing for the elderly and other vulnerable groups.

California faces an acute shortage of decent housing for its citizens. In 1980, the Legislature recognized this shortage as one of California's more pressing public concerns. It declared the attainment of a "suitable living environment for every California family" to be "a priority of the highest order." (Gov. Code, § 65580; see also Nash v. City of Santa Monica (1984) 37 Cal.3d 97.) While the private marketplace may meet the housing needs of those at higher income levels, the needs of other economic segments remain unfufilled.

I am concerned that the majority's interpretation of the relevant sections of the National Housing Act (12 U.S.C.A. §§ 1715v, 1713(l)) would enable the circumvention of the city's carefully drafted plan to ensure affordable housing for *all* of its citizens. In light of these concerns, I cannot join the opinion of my brethren.

BIRD, C.J.

Conditional Use Permit No. 4826

BE IT RESOLVED by the Council of the City of San Diego, as follows:

That Conditional Use Permit, Case No. 4826, requested by The Foundation for Specialized Group Housing to construct and operate a non-profit Senior Citizens Housing project located south of Governor Drive between Genesee Avenue and Boundary Freeway, in the R-1 zone, documented as No. 639744, May 31, 1962, in the office of the City Clerk, be, and the same is hereby approved subject to the following conditions:

1. That prior to the issuance of any building permits, complete building plans of the proposed senior citizens housing project (including signs) shall be submitted to the Planning Director for approval. Said plans shall be in substantial conformity with Exhibit 'A' on file in the Office of the Planning Department. The property shall be developed in accordance with the approved building plans except where regulations and this and/or other governmental agencies require deviation therefrom.

2. That prior to the issuance of any building permits, a complete landscaping plan, including a permanent watering system, shall be submitted to the Planning Director for approval. Approved planting shall be installed prior to occupancy of the subject property.

3. That prior to the issuance of any building permits, a final subdivision map covering the entire subject property shall be recorded, said map to include dedicated improved streets in lieu of the private roadways shown on Exhibit 'A'.

4. That not to exceed 550 apartment units shall be placed on the subject property in the approximate locations shown on Exhibit 'A'.

5. That prior to the occupancy of any building, not less than 602 parking spaces plus one parking space for every 300 square feet of gross floor area in the medical facilities building shall be provided; said parking spaces to be in either private garages or carports or in the parking areas shown on Exhibit 'A'. Each parking space in the designated parking areas shall be not less than 180 square feet in area, exclusive of aisle and driveway areas, and all off-street parking spaces shall be surfaced with not less than 2" A.C. or its equivalent, and each space shall be marked and provided with substantial stops.

6. That no vehicular parking shall be permitted at any time on any of the private driveways within this development.

7. That any floodlighting employed on the subject property shall be directed away from all adjoining property at all times.

8. That construction and operation of the proposed use shall comply at all times with the regulations and requirements of this and other governmental agencies.

BE IT FURTHER RESOLVED that the Council of the City of San Diego finds [the] following facts to be true:

1. That the proposed use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood or the community.

2. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity;

3. That the proposed use will comply with the regulations and conditions specified in the Code for such use; and

4. That the granting of this conditional use will not adversely affect the Master Plan of the City or the adopted plan of any governmental agency.

BE IT FURTHER RESOLVED by the Council of The City of San Diego, that the appeal of The Foundation For Specialized Group Housing is hereby SUSTAINED, and that the action taken by the Planning Commission on May 23, 1962, is hereby OVERRULED.

12 U.S.C. Section 1713(l)

Handling and disposal of property; settlement of claims

Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real and other property by the United States, the Secretary shall also have power, for the protection of the interests of the General Insurance Fund, to pay out of the General Insurance Fund all expenses or charges in connection with, and to deal with, complete, reconstruct, rent, renovate, modernize, insure, make contracts for the management of, or establish suitable agencies for the management of, or sell for cash or credit or lease in his discretion, any property acquired by him under this section; and notwithstanding any other provision of law, the Secretary shall also have power to pursue to final collection by way of compromise or otherwise all claims assigned and transferred to him in connection with the assignment, transfer, and delivery provided for in this section, and at any time, upon default, to foreclose on any property secured by a mortgage assigned and transferred to or held by him: Provided, that section 5 of Title 41 shall not be construed to apply to any contract for hazard insurance, or to any purchase or contract for services or supplies on account of such property if the amount thereof does not exceed $1,000.

12 U.S.C. Section 1715l

Housing for moderate income and displaced families

Purpose

(a) This section is designed to assist private industry in providing housing for low and moderate income families and displaced families.

(d) Eligibility for insurance; conditions; limits

To be eligible for insurance under this section, a mortgage shall--

(1) have been made to and be held by a mortgagee approved by the Secretary as responsible and able to service the mortgage properly;

(2) be secured by property upon which there is located a dwelling conforming to applicable standards prescribed by the Secretary under subsection (f) of this section, and meeting the requirements of all State laws, or local ordinances or regulations, relating to the public health or safety, zoning, or otherwise, which may be applicable thereto . . .

12 U.S.C. Section 1715v.

Insurance of mortgages for housing for elderly persons

Purpose; definitions

(a) The purpose of this section is to assist in relieving the shortage of housing for elderly persons and to increase the supply of rental housing for elderly persons.

For the purposes of this section--

(1) the term "housing" means eight or more new or rehabilitated living units, not less than 50 per centum of which are specially designed for the use and occupancy of elderly persons;

(2) the term "elderly person" means any person, married or single, who is sixty-two years of age or over; and

(3) the terms "mortgage", "mortgagee", "mortgagor", and "maturity date" shall have the meanings respectively set forth in section 1713 of this title.

24 C.F.R. Section 221.545 Development of property.

(a) Obligation of mortgagor. The mortgagor shall be obligated to develop the property as follows:

(1) A mortgagor, other than a rehabilitation sales mortgagor meeting the requirements of § 221.510(a)(3), shall be obligated to either construct and complete new housing accommodations on the mortgaged property or rehabilitate existing housing accommodations designed principally for residential use.

(2) A rehabilitation sales mortgagor meeting the requirements of § 221.510(a)(3) shall be obligated to purchase and rehabilitate existing housing.

(b) Minimum number of units. (1) A project, other than a project to be rehabilitated by a rehabilitation sales mortgagor meeting the requirements of § 221.510(a)(3), shall consist of not less than five dwelling units and may be detached, semidetached, or row houses, or multifamily structures.

(2) A project, where the mortgagor is a rehabilitation sales mortgagor meeting the requirements of § 221.510(a)(3), shall consist of not less than four single family dwellings or four one-family units in a condominium. The single family dwellings may be detached, semidetached, or row houses. The family units shall be located in a structure or structures concerning which the mortgagor certifies that it intends, upon completion of the project, to commit the ownership of the project to a plan of apartment ownership approved by the Commissioner.

(c) Compliance with governmental regulations. The property, including improvements, shall comply with any material zoning or deed restrictions applicable to the project site and with all applicable building and other governmental regulations.

24 C.F.R. Section 231.10 Development of property.

(a) Commercial and special facilities. The project may include such commercial and special facilities as the Commissioner deems adequate to serve the occupants of the project.

(b) Zoning, deed or building restrictions. The project when constructed or rehabilitated shall not violate any material zoning or deed restrictions applicable to the project site, and shall comply with all applicable building and other governmental requirements.

24 C.F.R. Section 290.20 Disposition objectives.

The disposition of HUD-owned multifamily housing projects shall be carried out in accordance with the objectives listed below.

(a) Reduce the inventory of HUD-owned projects in a timely manner consistent with the goals of:

(1) Preserving or increasing the number of housing units available to and affordable by lower income tenants;

(2) Maintaining the existing housing stock in decent, safe and sanitary condition; and

(3) Preserving and revitalizing urban residential neighborhoods.

(b) Consistent with meeting the above goals, to obtain a sale price based on the projects' present market value and anticipated future use or condition sufficient to protect the financial interests of the government and to produce a satisfactory return to the mortgage insurance funds.

(c) To dispose of projects in a manner which is consistent with HUD approved housing and community development needs, plans and actions of local governments to the extent feasible.

(d) To dispose of all projects in a manner which minimizes the displacement of tenants.

(e) To demolish projects only as a last resort.

(f) These are national objectives and, while local circumstances may make it impossible to meet all the objectives, they should be met to the greatest extent feasible. In some cases the objectives may represent conflicting public policy goals and decisions will have to be made to balance and choose among various objectives. In these cases discretion and judgment will have to be exercised in designing a program which best meets the national goals of providing affordable housing and preserving and revitalizing neighborhoods.

U.S. Constitution

Article VI, Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws any State to the Contrary notwithstanding.